IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

WEDNESDAY, THE 25TH JULY 2007 / 3RD SRAVANA 1929

WP(C).No. 24734 of 2005(T)

AGAINST THE ORDER DATED 13/01/2005 IN IA.NO.123/2005 IN OS.404/1999 of MUNSIFF COURT, PERUMBAVOOR

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PETITIONERS:

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1. HARIDAS, S/O. KARUNAKARA PILLAI
   KOOTHANALI VEETTIL, PERUMBAVOOR KARA & VILLAGE.

2. SREEKUMAR, S/O. KARUNAKARA PILLAI,
   KOOTHANALI VEETTIL, PERUMBAVOOR KARA & VILLAGE.

3. RAMACHANRAN NAIR, H/O. LATE KOMALAKUMARI
   KOOTHANALI VEETTIL, PERUMBAVOOR KARA AND VILLAGE.

4. JAYA, D/O. KOMALAKUMARI, KOOTHANALI
   VEETTIL, PERUMBAVOOR KARA AND VILLAGE.

5. JAYATHI, D/O. KOMALAKUMARI,
   KOOTHANALI VEETTIL, PERUMBAVOOR KARA AND VILLAGE.

6. JAYACHANDRAN, S/O. KOMALAKUMARI,
   KOOTHANALI VEETTIL, PERUMBAVOOR KARA & VILLAGE.

BY ADV. SRI.DENIZEN KOMATH

RESPONDENTS:

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1. C.G. SIVASANKARA PILLAI, S/O. GOVINDA
   PILLAI, CHEMBOTHINALLI HOUSE, PERUMBAVOOR
   KARA AND VILLAGE.

2. V.S. SASIMANI, WIDOW OF LATE RAJAPPAN
   NANGELI HOUSE, PERUMBAVOOR KARA AND VILLAGE.

3. BINDU, DAGHTER OF LATE RAJAPPAN,
   NANGELI HOUSE, PERUMBAVOOR KARA AND VILLAGE.

4. BENOY, S/O. LATE RAJAPPAN,
NANGELI HOUSE, PERUMBAVOOR KARA AND VILLAGE.

BY ADV. SRI.T.K.SAJEEV

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 25/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC : 24734 OF 2005

APPENDIX

PETITIONERS' EXHIBITS:

EXT.P1 : TRUE COPY OF THE ORDER IN IA NO.123/03 IN OS NO.404/99 DT.13.01.05, IN THE FILE OF THE MUNSIFF'S COURT, PERUMBAVOOR.

EXT.P2 : TRUE COPY OF THE JUDGMENT IN OS NO.404/99 DT.13.01.05, IN THE FILE OF THE MUNSIFF'S COURT, PERUMBAVOOR.

EXT.P2(A) : TRUE COYPY OF THE DECREE IN OS NO.404/99 DT.13.01.05, IN THE FILE OF THE MUNSIFF'S COURT, PERUMBAVOOR.

PIUS C. KURIAKOSE, J.

W.P.(C) No. 24734 OF 2005

Dated this the 25th day of July, 2007

JUDGMENT

Ext.P1 order by which the court below allowed the petitions filed by the plaintiff for withdrawal from the suit with liberty to institute a fresh suit on the same subject matter only in part (i.e. permitting withdrawal but not granting liberty to file fresh suit) is under challenge. Exts.P1 and P2 judgments are also under challenge which have been passed consequent on Ext.P1. The petitioner sought permission to withdraw from the suit and liberty to institute fresh suit on the same subject matter on the ground that the present suit was liable to be filed on account of a non-impleadment of a necessary party. According to the petitioner, the above defect was a formal defect as envisaged by Clause A of Sub Rule 3 of Order XXIII Rule1. The learned Munsiff would opine that such a defect will not be a formal defect and that the petitioners who were given several opportunities to implead necessary parties did not avail those opportunities. It appears to me that the judgment of Sri.M.P. Menon, Judge in **Prabhavathi v. Kunhathabi Umma** [**1981 KLT 438**] wherein this very issue was decided by the learned Judge was not brought to the notice of the learned Munsiff. The learned Judge held that though

ordinarily, formal defects for the purpose of Clause A of Sub Rule 3 will be defects unconnected with the merits of the suit such as misjoinder of the parties, erroneous valuation of the subject matter, rejection of a material document for want of stamp, failure to disclose cause of action, defect of non-impleadment of a necessary party is also can be construed as a formal defect. The judgment in **Parvathy**'s (supra) case was a binding precedent for the learned Munsiff and I am I in respectful agreement with the view expressed in **Parvathy**'s (supra) case by the learned Judge.

Accordingly, I set aside the impugned order and allow the IA filed by the petitioner but only on terms. The petitioner is directed to pay a total amount of Rs.3,500/- by way of cost. Out of which Rs.3,000/- be paid to the respondent either directly or through the counsel appearing for him in this court and Rs.500/- to the High Court Legal Services Committee within one month from today. Once the cost is paid and the order allowing the I.A. becomes operative, it is open to the petitioner to file fresh suit on the same cause of action and on the same subject matter. The court which comes to entertain the prospective suit will ensure that the petitioner does not violate the principles laid down by this court in **Neelakanta Pillai v. Madhavakurup** [**2007 (2) KHC 169**]

regarding the scope of fresh suits to be instituted after obtaining leave under Order XXIII Rule 1A.

PIUS C. KURIAKOSE, JUDGE

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